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No. 87-398

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California Limited Partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Appellee.

On Appeal from the Court of Appeal of the State of California

MOTION OF APPELLEE TO DISMISS FOR LACK OF JURISDICTION AND FOR LACK OF A PROPERLY PRESENTED, SUBSTANTIAL FEDERAL QUESTION

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MOTION OF APPELLEE TO DISMISS FOR LACK OF JURISDICTION AND FOR LACK OF A PROPERLY PRESENTED, SUBSTANTIAL FEDERAL QUESTION

Pursuant to Rule 16.1, the Appellee City and County of San Francisco moves to dismiss the appeal filed on behalf of Appellant Russ Building Partnership on the grounds that the appeal is not timely, the Takings Clause issue was not properly presented to the California Supreme Court, and in any event the federal issues presented are not substantial.

ARGUMENT

I

THIS APPEAL MUST BE DISMISSED AS UNTIMELY

The California Supreme Court entered two orders in this case. *See* Jur. Stmt. App. C (April 30, 1987); App. B (June 3, 1987). If Appellant's time for appeal ran from the second order, this

appeal would be timely; but because it ran from the first order, it is untimely.[1]

There were two cases, and hence two appeals, before the California courts. The first (*Russ Building*) dealt with the legality of San Francisco's Transit Impact Development Fee Ordinance. The second (*Pacific Gateway/Crocker National Bank*) challenged both the legality of the Ordinance *and* its applicability to two buildings whose permits were issued prior to its enactment but contained a condition that the City claimed rendered those projects subject to the subsequently-enacted Ordinance.[2]

These appeals arrived at the California Court of Appeal several months apart, and were separately briefed.[3] The Court of Appeal consolidated the two appeals for hearing and decision in that court. On January 20, 1987 it filed its opinion upholding the Ordinance (Jur. Stmt. App. A-1 to 11, A-16 to 23) but finding, in Section V of its opinion, that the Ordinance could not be applied retroactively to the Pacific Gateway and Crocker projects. *See id.* A-11 to 16.

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[1] The notice of appeal was filed on August 28, 1987. Jur. Stmt. App. E.

[2] Appellant describes Pacific Gateway and Crocker as "Appellees" in this Court. Jur. Stmt. at i n.*, 5. That statement is incorrect. Pacific Gateway and Crocker are not parties to this case and never have been. Their separate case is now pending before the California Supreme Court, and was argued in that court on September 8, 1987. A decision may not be forthcoming for several months.

In that regard, shortly before the printing of this brief we received a copy of a document entitled "Appellees' Response In Support of Appellant's Jurisdictional Statement" filed by Pacific Gateway and Crocker. Because they are not parties to this appeal, that paper is unauthorized; accordingly, the City has filed a separate motion in this Court to strike it.

[3] Briefing in *Russ Building* was completed on April 18, 1986. *Pacific Gateway*, which had remained behind in the trial court for trial on the issues it did not have in common with *Russ Building* until judgment was entered on November 4, 1985, was not fully briefed in the Court of Appeal until June 6, 1986.

Appellee City filed a Petition for Review in the California Supreme Court in *Pacific Gateway/Crocker* limited to the issue of whether the Ordinance could be applied to those two projects.[4] Appellant filed a Petition For Review in *Russ Building*, seeking review of various issues going to the legality of the Ordinance itself.

On April 30, 1987, the Supreme Court of California entered the following order:

"Petitions for review GRANTED.

> "Pursuant to rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.
>
> "Review shall not extend to the issues raised in the answers to the petitions for review." (Jur. Stmt. App. C)

The order confined review in the California Supreme Court to two issues raised in the City's Petition (both of which went to the question of whether the Ordinance could be applied to the two projects approved prior to its enactment) and refused review of the issues raised in Appellant Russ Building's petition (*i.e.*, whether the Ordinance was lawful).[5] Indeed, it expressly specified the two issues which it would review, neither of which was remotely within those raised by Appellant's petition (which had nothing to do with the issue of retroactive application).

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[4] Pacific Gateway and Crocker opposed the petition but urged that, if it was granted, the Court *also* consider various issues going to the legality of the Ordinance itself.

[5] In the last paragraph of its Order, the Supreme Court also declined to review the additional issues relating to the Ordinance's legality raised in Pacific Gateway/Crocker's Answer to Petition For Review. *See* note 4, *supra*.

Appellant (joined by the City) thereafter wrote the California Supreme Court asking it to state expressly whether or not the petition for review in *Russ Building* had been denied. App. A, *infra*.[6] On June 3, 1987, the California Supreme Court confirmed that its prior order had indeed denied the petition:

> "The order granting review is hereby modified: Petition for review by Russ Building Partnership DENIED. Petition for review by the City and County of San Francisco GRANTED.
>
> "Pursuant to rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.
>
> "Review shall not extend to the issues raised in the answers to the petitions for review." (Jur. Stmt. App. B)

The second and third paragraphs of this order—in which the California Supreme Court states that "review is limited to" issues raised only in *Pacific Gateway/Crocker*—are identical to the prior order. The revision to the first paragraph merely makes explicit the denial of the Russ Building Petition for Review. Significantly, when this order was filed, Appellant had nearly two months to file its notice of appeal from the April 30 order. *See* 28 U.S.C. § 2101(c).

Although the April 30 Order did not expressly include the words "petition denied" in dealing with the *Russ Building* case, it made clear that review indeed had been denied for *all* of the issues raised in the petition filed in the *Russ Building* case, and limited review to the "retroactivity" issues raised only in *Pacific*

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[6] This informal letter was not a motion for reconsideration or rehearing. Indeed, such a motion is not authorized by the California Rules of Court with respect to the denial of a petition for review. The parties had no way of knowing whether the court would even respond to the letter.

Gateway/Crocker, none of which was raised by Appellant and none of which could have an impact upon it. At that juncture, Appellant had a final decision from the highest California court concluding the litigation on every issue raised by and/or possibly affecting it. There was, therefore, a final judgment in *Russ Building* as of April 30, 1987, and the time for appeal began to run on that date.

The subsequent order of the California Supreme Court on June 3 does not alter this conclusion. That order merely made the denial of Appellant's petition explicit. But the "mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be sought." *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952)). Under that standard, the issue is whether the second order "*disturbed or revised* legal rights and obligations which, by its prior order, had been plainly and properly settled with finality." *Honeywell, supra*, 344 U.S. at 212 (emphasis added).

In the present case, the second order did not "disturb or revise" rights which had been settled by the first. The first order did not grant Appellant's petition; indeed, it did the opposite by refusing to consider any of the issues raised in Appellant's petition or any issues which would affect Appellant. Thus the second order—which at most made explicit a denial which was obviously implicit in the first—confirmed, and in no way "revise[d]", the original April 30 Order. As the Court observed in *Honeywell*:

> "[W]e do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases when review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of these time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." (*Id.* at 213)

The present case is indistinguishable from *Department of Banking v. Pink*, 317 U.S. 264 (1942), which the Court cited with approval in *Honeywell*, 344 U.S. at 211 n.9. In *Pink*, certiorari was sought after the New York Court of Appeals had affirmed a lower court's judgment. After entry of that affirmance, a motion was filed asking the state court to amend its remittitur by adding a statement that the federal question had been presented to and decided by it; the request was granted and the remittitur was so amended. This Court held that the petition, which had been filed within 90 days of the second order but not the first, was untimely:

> "Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion." (317 U.S. at 266)

The Court added that

> "[f]or purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final [citations], but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court. (*Id.* at 268)

In this case, as in *Pink*, no motion for reconsideration or rehearing was filed.[7] The letter sent to the California Supreme Court requesting that the Court expressly indicate whether the petition for review had been denied "did not seek to have the [Supreme Court] reconsider any question decided in the case." *Pink*, *supra*, 317 U.S. at 266. "The final judgment already *rendered* was not challenged . . . ." *Id.*

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[7] Indeed, as previously noted, such a motion is not authorized in California. *See* note 6, *supra*.

Nor does this case fall within the exception to the *Honeywell* principle applicable "when the lower court changes matters of substance, or resolves a genuine ambiguity." *Honeywell*, 344 U.S. at 211. Both the example cited in *Honeywell* (*Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952)) and those cases which have followed it[8] involved substantive modifications to the original decision. In *Honeywell*, the Court distinguished between such cases and those in which "a judgment previously entered has been reentered or revised in an immaterial way" and held that a modification in the latter category "does not toll the time within which review must be sought." 344 U.S. at 211 (citing *Department of Banking v. Pink*, *supra*).

When the California Supreme Court issued its second order on June 3, 1987, only 34 days had elapsed since the first order of April 30. Nearly two months remained before the deadline of July 29, 1987 for noticing an appeal to this Court. This appeal was not filed until August 28, 1987 and is therefore untimely.

II

THIS APPEAL MUST BE DISMISSED WITH RESPECT TO THE TAKINGS CLAUSE ISSUE BECAUSE APPELLANT FAILED TO RAISE THAT CLAIM IN THE STATE COURTS

The Jurisdictional Statement omits the usual section describing how the federal question was raised at every stage of the proceedings, especially in the state's highest court. This was not an oversight, as Appellant did not raise the "taking" question in the California Supreme Court or, for that matter, at any other appropriate stage of the proceedings below.

Although the "taking" claim was raised in the separate complaint filed in the *Pacific Gateway/Crocker* case, it was *not* raised in *this* case. It was not raised in the *Russ Building* complaint or in

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[8] *See Burlington Northern Inc. v. United States*, 459 U.S. 131, 138 n.5 (1982); *Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

the extensive pre-trial and post-trial briefing.[9] It was not raised in Russ Building's briefs to the Court of Appeal or in a petition for rehearing from its decision upholding the Transit Fee. Most significantly, it was not raised in Russ Building's Petition For Review filed in the California Supreme Court, which that court denied.

Appellant invokes the principle that "'where the state court has considered and decided the constitutional claim, [this Court] need not consider how or when the question was raised.'" Jur. Stmt. at 3 n.1, quoting *First English Evangelical Lutheran Church v. City of Los Angeles*, — U.S. —, 55 U.S.L.W. 4781 (June 9, 1987). Although Appellant does not explain the significance of that statement, we presume its position is that the "taking" issue was decided by the Court of Appeal in its single opinion for both the *Pacific Gateway/Crocker* case and the *Russ Building* case. It is doubtful that the Court of Appeal decided the taking issue at all; but if it did, it could only have done so in the *Pacific Gateway/Crocker* case, and not in *Russ Building* in which the issue had not been raised or briefed.[10] But even if the Court of

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[9] That claim was belatedly raised in a post-trial motion after the trial court had ruled against Appellant. *See* Clerk's Transcript 1545. It was never alluded to again by Appellant until *after* the California Supreme Court had denied review in this case when Appellant wrote a letter in the *Pacific Gateway/Crocker* case supporting a request by Pacific Legal Foundation, appearing as an *amicus curae*, that the court expand the issues under review in that case.

[10] Although the appellants in *Pacific Gateway/Crocker* did raise the "taking" claim in their briefs, the Court of Appeal made only a passing reference to that claim in its opinion. *See* Jur. Stmt. App. A-9; *compare id.* at A-23 (summarizing its holding without mention of "taking" issue). To the extent the Court of Appeal's opinion may be read as having decided the taking issue, it could only have done so in deciding the *Pacific Gateway/Crocker* appeal and not in the *Russ Building* appeal, as the California appellate courts ordinarily consider questions abandoned unless they are raised, briefed and supported by citation of authority. *See, e.g., Traensegaard v. Silvercrest Indus., Inc.*, 175 Cal. App. 3d 218, 228 (1985); 9 B. Witkin, *California Procedure*, Appeal § 479 (3d ed. 1985).

Appeal had decided that issue, and even if it had done so in *this* case, that would only be of assistance to Appellant *if* the California Court of Appeal was the highest court in the California judicial system; of course it is not. Appellant was required to raise the "taking" claim in the Supreme Court of California. 28 U.S.C. § 1257; *Banks v. California*, 395 U.S. 708 (1969). Its failure to do so is fatal to its attempt to raise that issue here.

Appellant may respond that counsel for Pacific Gateway/Crocker raised the taking question in a brief filed in the California Supreme Court. *See* note 4, *Supra*. That cannot assist Appellant, which undeniably failed to raise the issue in *its* petition to the state's highest court.[11] *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 25 (1924) (party which failed to raise federal question below cannot seek review here even though co-party raised issue below); *Sully v. American National Bank*, 178 U.S. 289, 297-98 (1900) (same).[12] For these reasons, the "taking" issue is not properly before this Court.

III

THIS APPEAL MUST BE DISMISSED BECAUSE THE FEDERAL QUESTIONS PRESENTED BY APPELLANT ARE NOT SUBSTANTIAL AND WERE CORRECTLY DECIDED BELOW

Whatever importance may attach to the state law issues decided in this case, the federal questions presented (even assuming, contrary to the arguments above, that the Takings Clause question is properly presented) are not substantial. As the following discussion shows, the opinions below correctly resolved the federal questions. Appellant's contrary argument ultimately

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[11] As that assertion can only be verified by an examination of the entire document, we have lodged with the Clerk a certified copy of Russ Building's Petition For Review.

[12] Moreover, although the Court of Appeal had for convenience consolidated the two cases for oral argument and briefing, they were indeed two separate cases. Briefing was complete in the *Russ Building* case prior to the consolidation and, therefore, the scope of the issues presented in that case had already been determined.

rests on the unsupportable proposition that there is a distinction of constitutional magnitude between a finding of fact which is "rational" and one which is "reasonable."

The Transit Impact Development Fee Ordinance was enacted by the City and County of San Francisco in May 1981. It is designed to collect from developers of new office space in a defined area of downtown San Francisco an amount sufficient to defray the increased costs the City's public transit system would incur in providing the increased peak period transit service necessary to accommodate increased ridership resulting from the new office development during its lifetime, subject to a five dollar per square foot cap.[13] Ord. §§ 38.3, 38.4 (Jur. Stmt. App. F-3 to 5) In enacting the Ordinance, San Francisco was very much aware of the requirement that the fee must advance a legitimate public purpose. The legislation itself described the nexus:

> "New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.
>
> "This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.
>
> "That level of additional costs incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new

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[13] Absent that legislative limit, the trial court determined that the Board of Supervisors could have set the fee in excess of $7.50 per square foot. Jur. Stmt. App. D-25 to 26.

> developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development." (Ord. § 38.2 (Jur. Stmt. App. G-3))

Indeed, to be absolutely certain that the fee could be used for no purpose other than advancing the specific public end of mitigating the adverse impact on peak-period public transit of new office development, the Ordinance required that "sums derived from the collection of the Transit Impact Development Fee shall be held in trust" with the proceeds to

> "be used only for the provision of peak-period public transit service over and above public transit service being provided on March 1, 1980, to and from and within the downtown area, to compensate for and to defray the capital and operating costs incurred by the City in providing the benefit of public transit service in the downtown area in order to meet the special peak-period burden placed on the City by the addition of new office use in new developments in the downtown area of the City." (Ord. § 38.7 (Jur. Stmt. App. F-10 to 11))[14]

In setting the amount of the fee, the Board of Supervisors relied on a cost analysis prepared by a staff economist and an independent cost study prepared by Touche Ross & Co., both of which studies the Board of Supervisors approved after public hearings. Jur. Stmt. App. G-8. Thus, the legislature made findings, based on two separate, sophisticated analyses, that the costs the City would incur would in fact exceed the five dollar fee by a substantial amount.

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[14] This limitation on the use of the Transit Fee, which is not even mentioned in Appellant's Jurisdictional Statement, removes any incentive for collecting more than the costs of services to be provided and prevents application of any proceeds to the general revenue needs of the City.

Notwithstanding these legislative findings of fact, the trial court permitted Appellant to explore every conceivable detail of the cost analyses in the course of a 45-day trial. The trial court carefully considered the evidence and, in an opinion taking 31 printed pages in Appellant's Appendix D, held that the legislatively-found facts had a rational basis (Jur. Stmt. App. D-21) and that "[i]f the court were to assume *arguendo* that the City may not extract a development fee which exceeds the Muni's actual incremental cost" of providing transit service to new office buildings, then that actual cost is at least $7.55 per square foot. *Id.* D-26.

On appeal, Appellant argued vigorously, as it does here, that the rational basis standard for reviewing legislative facts was illusory and that the proper standard was that the findings must be "reasonable."[15] The Court of Appeal, however, upheld the trial court's opinion, holding that "the charge levied is directly related and limited to the costs of increased municipal transportation services engendered by the particular development" and that "the City has undertaken numerous studies and has held public hearings to determine the *reasonable* costs of the increased transit services." Jur. Stmt. App. A-6 (emphasis supplied). The Court of Appeal refused to indulge in Appellant's semantic exercise, recognizing instead that "rational" and "reasonable" are synonymous and may be used interchangeably. For example, the Court of Appeal wrote that "[t]he trial court found that the 45-year forecast was *reasonable* as it '*rationally* and directly related' to the estimated life of the buildings." Jur. Stmt. App. A-16 (emphasis supplied). *See also id.* at A-22 (Court of Appeal repeatedly refers to trial court as having decided whether legislatively found facts were "reasonable.")

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[15] Appellant did not argue below, and does not argue here, that the Court is required to hold a trial *de novo* and make an independent judgment as to the correctness of the facts found by the legislature. Instead, it argues that the court must determine only whether the estimate of transit costs was "reasonable." Jur. Stmt. at 9, 10 n.9. As discussed in Section III(A)(2), *infra*, there is no distinction as a matter of law between the standard for which Appellant argues and the standard the court applied.

Significantly, the Court of Appeal destroyed Appellant's argument that the state court's standard of review was illusory and erroneous by *overturning* two aspects of the Transit Fee cost calculation. *Id.* at A-21 to 22. The court did so based on the very standard of reasonableness which Appellant claims should have been used:

> "This, plaintiff claims, *unreasonably* inflated the fast pass/cash ratio and yielded underestimated revenue. We agree." *Id.* at A-21 (emphasis supplied).[16]

Thus, the Court of Appeal not only demonstrated that it was applying exactly the standard of review for which Appellant had argued, but that the standard has teeth and will preclude a municipality from setting a fee in an arbitrary amount.

The California Supreme Court denied Appellant's petition for review of the two federal issues Appellant presented—substantive due process and equal protection.

For the reasons which follow, the California Court of Appeal's decision presents no substantial federal question.

A. Even If The Takings Clause Issue Were Properly Before This Court, It Would Not Present A Substantial Question

Appellant's belated argument that the Transit Impact Development Fee violates the Takings Clause of the United States Constitution is premised on this Court's recent decision in *Nollan v. California Coastal Commission*, — U.S. —, 55 U.S.L.W. 5145 (June 26, 1987). In particular, Appellant argues that because *Nollan* requires that a condition imposed on the grant of a land-use permit must "substantially advance legitimate state interests" (*id.* at 5147), it somehow follows that the Transit Fee cannot be upheld unless a "reasonable estimate" (Jur. Stmt. at 9) of the financial burden exceeds the fee imposed as a condition of development. Therefore, Appellant argues, the courts were re-

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[16] Having found that there were two errors in the cost calculation, however, the Court of Appeal went on to determine that the errors were harmless and that correcting the calculation would still leave the cost well above $5 per square foot. Jur. Stmt. App. A-23.

quired to determine whether the factual findings supporting the Transit Fee were "reasonable," as opposed to "rational." In fact, as shown in Section III(A)(2), *infra*, there is no distinction between the two tests, and the state courts applied exactly the test Appellant advocates. As a prelude to that analysis, however, we show in Section III(A)(1), *infra*, that *Nollan* does not impose any requirement with respect to the calculation of the amount of a fee, and that the Transit Fee fully satisfies the nexus requirement *Nollan* does impose. For both of these reasons, even if Appellant had raised this issue below, the decision of the California courts was correct and presents no substantial federal question warranting review in this court.

1. It Is Clear From The Record, And The State Courts Have Already Held, That The Transit Fee Substantially Advances The Legitimate State Purpose For Which It Was Imposed, And The Takings Clause Requires Nothing More Of A Condition On Development

Nollan held that the Takings Clause is satisfied so long as a condition on development substantially advances the legitimate state purpose for which it is imposed. 55 U.S.L.W. at 5147. Here, as shown in subsection (a) *infra*, the Transit Fee meets that standard. As shown in subsection (b), *Nollan* does not speak to the issue of the *amount* of a fee which is found to advance a legitimate purpose, let alone the standard of review by which a court determines whether to uphold a legislatively-found fact. Nor does it replace normal rules of deference to the legislative fact-finding process with a requirement that the courts serve as Supreme Boards of Accountancy regarding the amount of a development fee.

a. There Is A Sufficient Nexus Between The Transit Fee And The Legislative Purpose For Which It Was Imposed

This is simply not a case such as *Nollan* where the courts are presented with the task of trying to discern from a silent record the legislative purpose for imposing a condition and then attempting to determine whether there is an adequate relationship between that purpose and that condition. Here, as explained at

pp. 10-11, *supra*, the San Francisco Board of Supervisors stated its purpose expressly. The Transit Fee was adopted to defray the increased public transit costs which would be imposed on the City by new office development. At no time in this litigation has there been any question as to whether the State's purpose was legitimate. Nor can there be any question as to whether the Transit Fee substantially advances that purpose. The Transit Fee is exactly tailored to advance its purpose. It is calculated on the basis of the additional burden imposed as a result of new office development, and *the ordinance prohibits expenditure of any of the proceeds for any purpose other than providing additional transit service to serve that expanded demand. See* p. 11, *supra*.[17]

Not only is it clear from the record that the Transit Fee is exactly tailored to serve the legitimate state purpose, but the California courts have expressly so found. The trial court held:

> "Since the objective of providing adequate public transportation is a legitimate governmental objective, this Court must determine whether there is a sufficient nexus between the stated objective and the extraction of TIDF fee. The TIDF specifically states that the funds may not be used except to meet the increased demand for peak-period transit facilities created by new office development. (TIDF Section 38.7) Since the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices, there is a sufficient nexus." (Jur. Stmt. App. D-7)

The Court of Appeal was just as clear, holding that the Transit Fee "is directly related and limited to the costs of increased municipal transportation services engendered by the particular

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[17] Thus, the Ordinance itself precludes the possibility that the developers paying the Fee will be providing extra revenue for unrelated transit service or making a forced contribution to general governmental revenues (Jur. Stmt. at 10) through its requirement that proceeds of the Fee can be used for no other purpose than meeting the exact evil to which the condition is addressed.

development. . . ." *Id.* at A-6.[18] Thus, the *Nollan* requirement that the condition "substantially advance" the legitimate governmental purpose plainly was met in this case.

b. Nollan Does Not Speak To The Issue Of The Amount Of A Fee Which Substantially Advances A Legitimate Purpose, Let Alone The Standard By Which Courts Review Legislatively-Determined Facts Regarding Its Calculation

Nothing in *Nollan* or any other Takings Clause case has ever addressed the issue of the amount of a fee imposed as a condition on development or the standard of review by which the courts must evaluate the legislatively-found facts regarding its calculation in order to determine whether a taking has occurred.[19] *Nollan* held that a condition on development creating an easement across the plaintiff's beachfront was a taking because it would not advance the purpose of increasing visual access from the street. *Nollan* does not inquire into the issue of the extent to which construction of a new house might impair public access to the beach, and made clear that no such inquiry was necessary for purposes of Takings Clause analysis. In *Nollan* the Coastal Commission would have been free to impose *any* condition which protected the public's ability to see the beach from the street even

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[18] As is clear from the state courts' opinions, they did not rely on the "debatably rational" factual standard of review in determining the existence of a nexus.

[19] *Norwood v. Baker*, 172 U.S. 269 (1898) does not support applying the *Nollan* holding to review of the amount of a fee imposed as a condition of development. *Norwood* did not involve a condition on development where the government has the power to grant or withhold a permit in its discretion, the situation which pertained in *Nollan* and pertains here. *Norwood* involved a special assessment district where the justification for imposition of an exaction and, therefore, the measure of the permissible exaction, is the conferring of special benefit upon the property owner.

if that condition constituted a permanent grant of continuous access to part of the property. 55 U.S.L.W. at 5147.[20]

Nollan did not require for Takings Clause purposes that there be any effort to measure the amount by which visual access to the beach had been impaired or to limit the access for viewing purposes to that "quantity" which would exactly restore the impairment. So long as the required nexus exists, the Takings Clause leaves the issue of the amount of the fee to the legislative process as reviewed under appropriate principles and standards by the state courts.[21] Although state law may require that the amount of the fee not exceed the cost of the services to be provided,[22] the Takings Clause is satisfied so long as the condition substantially advances the governmental purpose for which it is imposed. *Nollan*, 55 U.S.L.W. at 5147.

Even as to those facts which were relevant to the Court's analysis, *Nollan* did not impose any new or higher standard of review. *Nollan* took as given the facts found by the Coastal

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[20] That is so because this Court assumed the Coastal Commission had the power to forbid construction of a new house altogether. Here, Appellee had the power to deny Appellant's permits and so, as in *Nollan*, Appellee had the right to impose a lesser condition without contravening the Takings Clause so long as that condition substantially advanced the legitimate state interest for which it was imposed.

[21] This approach is entirely reasonable given that payment of the Transit Impact Development Fee is voluntary in the sense that an owner of property in downtown San Francisco who deems the fee too great is free to continue the existing use or engage in development of any use other than new office space without subjecting himself to the fee. *Ayres v. City Council*, 34 Cal. 2d 31, 42 (1949). Thus, the Transit Fee does not deprive any owner of the use of property.

[22] As we have noted, the trial court held that any requirement of law that would limit a development fee to actual cost was satisfied in this case because actual cost was at least $7.55 per square foot. Jur. Stmt. App. D-26. The Court of Appeal assumed that a fee could not exceed actual cost, disagreed with the trial court on two aspects of the cost calculation, and found that as adjusted by a correction of these errors the costs would fall to $6.95 per square foot. *Id.* at A-23.

Commission and reasoned from them. For example, *Nollan* did not question the finding that there would be visual impairment as a result of the new building or require a trial *de novo* of that finding. Certainly *Nollan* was not intended to require every court confronted with a challenge to a governmental exaction to engage in the intricate cost accounting necessary to replicate the work of the legislative body and to determine independently whether the amount of a fee is appropriate.[23]

2. In Any Event, There Is No Constitutional Distinction Between A Determination Which Is "Rational" And One Which Is "Reasonable"

Even if Appellant were correct that the Takings Clause requires courts to delve into cost-accounting, its argument would still fail because the courts below determined that the Fee was less than the cost of services by applying exactly the standard of review which Appellant advocates. Appellant contends that there is a distinction for constitutional purposes between a fact which is "rational" and a fact which is "reasonable."[24] No such distinction exists in the law. Resort to any dictionary confirms the obvious: "rational" is defined in terms of having, exercising, manifesting, or being based on "reason" and "reasonable" is defined in terms

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[23] This is consistent with the teaching of *Nollan*'s footnote 3. That footnote did not address the standard by which legislatively-found facts are to be reviewed. Instead, it addressed the test by which the existence of a nexus must be determined. It held that the condition must in fact "substantially advance" the "legitimate state interests" and that it would not be sufficient to establish a nexus that the state "could rationally have decided that such a nexus exists." The note distinguished the Takings Clause nexus review from the minimum rationality test which governs substantive due process and equal protection cases where the courts attempt to determine after the fact whether there is any possible legitimate State purpose that could be served by the legislation at issue.

[24] The addition of the term "debatable" in no way alters the test. Lawyers and courts often express the same thought with the word "arguable." This term simply recognizes the obvious—that someone will be prepared to controvert virtually any statement and that no legislation could be adopted if it were required to be based on facts which were beyond debate.

of being "rational." *See, e.g., American Heritage Dictionary of the English Language 1083, 1086 (1981)*. As shown above, the California Court of Appeal based its opinion on this same understanding, defining "reasonable" as "rationally and directly related" (Jur. Stmt. App. A-16) and describing the trial court's findings based on the debatable rational basis standard as having found that the cost analysis was reasonable. *Id.* at A-6, 22.

This Court, too, has repeatedly used the terms "rational" and "reasonable" interchangeably. For example, where an administrative determination must have "a reasonable basis in the law . . ., the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Dobson v. Commission of Internal Revenue*, 320 U.S. 489, 501 (1943), *quoting Rochester Telephone Corp. v. United States*, 307 U.S. 125, 146 (1939). Similarly, Justice Holmes, writing in dissent in *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 406 (1928), wrote: "We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor." *Compare Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 54 U.S.L.W. 4755, 4757 (June 25, 1986) (looking to a "reasonable jury"), with *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 54 U.S.L.W. 4319, 4322, 4326 (March 26, 1986) (in which the same test looks to a "rational trier of fact"). *See also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (Court will not substitute its judgment for that of the legislature as to the existence of a public use unless the legislature's judgment is "palpably without reasonable foundation," and test is satisfied where the legislative act is "rationally related" to a conceivable public purpose).

Therefore, even if Appellant were correct that *Nollan* imposes a Takings Clause requirement that the amount of the Transit Fee be "reasonably related" to the costs of providing transit service (Jur. Stmt. at 10-11), the state courts have determined that such a standard was met.

B. No Substantial Issue Is Presented With Respect To Whether The Transit Impact Development Fee Violates The Due Process Or Equal Protection Clauses

It is well-established, and Appellant does not argue otherwise, that to satisfy the Due Process and Equal Protection Clauses, a development fee or a classification establishing such a fee need only bear some reasonable relation to the evils to be eradicated or the advantages to be secured. *See* Jur. Stmt. at 12-13. Moreover, as *Nollan* itself recognized, where regulation of property is at issue the standards for equal protection and due process challenges are less onerous than for a takings challenge, and it is enough that the state could rationally have decided that the measure might achieve the state's objective. 55 U.S.L.W. at 5147, n.3.

Appellant argues that the Transit Fee violates due process because costs cannot be projected with certainty over a 45-year period and denies Equal Protection because it excludes retail development. The state court considered both of these arguments and rejected them in the face of the clear nexus discussed above between the Transit Fee and the legitimate governmental purpose for which it was imposed. The California Court of Appeal decided that the 45-year forecast "was not arbitrary or unreasonable" (Jur. Stmt. App. A-9) and "was supported by substantial evidence." *Id.* at A-17.[25]

As for the equal protection claim, the Ordinance itself explains why the fee was not also imposed on new retail space or other uses:

> "Even though other uses such as retail use also generate Municipal Railway peak-period person trips (and even if a particular alternate use were to generate more such trips than do office uses), the Board refrains from imposing the Transit

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[25] We have not undertaken to summarize the voluminous evidence presented to the California courts regarding the basis for, and reliability of, the cost projections. Suffice it to say that the issue was thoroughly explored in the trial court (*see, e.g.*, Jur. Stmt. App. D-10 to D-28), and in the appellate briefs filed in the California Court of Appeal, as well as in that court's opinion.

> Impact Development Fee on such uses at this time, and in that regard finds: (1) The vast majority of new commercial space in the downtown area will be devoted to office uses, and the primary cause for new peak-period Municipal Railway passengers will be the development of new office uses; and (2) a significant proportion of the new retail and service uses which will hereafter be developed in the downtown area will be constructed in connection with new office developments and, for that reason, limitation of the Fee to office uses both ameliorates the economic impact of the Fee on developers of office space and encourages the development of projects with mixed uses consisting of office, retail and service uses." (Ordinance § 38.2 (Jur. Stmt. App. G-4))

The Court of Appeal upheld the legislative finding that office space, and not retail space, is primarily responsible for the need for increased peak period transit services in San Francisco[26] and concluded that the imposition of the fee on office space "must be upheld as being directly and additionally related to legitimate governmental goals." *Id.* at A-8. Its rejection of the equal protection claim was correct and raises no substantial federal question.

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[26] The court noted that projected new office space was nearly ten times that of projected new retail space, and that the City could "rationally decide to focus its attack on the problem of funding the costs of additional transit facilities on the type of real property development creating the greatest increase in peak period ridership." Jur. Stmt. App D-29.

CONCLUSION

For all of the reasons stated above, Appellant's appeal must be dismissed because it is untimely. The Takings Clause issue has not been properly preserved and is not properly before this Court. In the alternative, the judgment of the California courts should be affirmed because it is clear from the record below and the decisions of the California courts that the Transit Impact Development Fee is not contrary to the Takings Clause, the Due Process Clause, or the Equal Protection Clause of the United States Constitution.

DATED: September 30, 1987.

Respectfully submitted,

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Appendix A

May 7, 1987

Clerk, Supreme Court of the
State of California
455 Golden Gate Avenue
San Francisco, CA 94102

Re: *Russ Building Partnership* v. *City & County of San Francisco, No. A030997; and Crocker National Bank, et al. and Pacific Gateway Associates Joint Venture v. City & County of San Francisco, No. A033493*

Dear Sir:

This letter is written in the above cases on behalf of Petitioner Russ Building Partnership, Petitioner, and Respondent City and County of San Francisco, and Respondents Pacific Gateway Associates Joint Venture, et al., with respect to the order granting review filed April 30, 1987, by this Court (a copy of which is enclosed).

These are petitions filed in two separate cases which were treated as consolidated in the trial court, were heard on the same day by the Court of Appeal and decided in a single opinion. In *Russ Building* (CA No. A030997), the petition was filed by plaintiff Russ Building Partnership. In *Pacific Gateway/Crocker* (CA No. A033493), the petition was filed by defendant City and County of San Francisco. The Court's order provides that "Petitions [plural] for review GRANTED" yet the limitation of issues is confined to issues raised only in the Petition for Review filed by the City in *Pacific Gateway/Crocker* (CA No. A033493). The parties respectfully request that the Court clarify its order in the following respects:

1. Did the Court intend to grant both petitions for review?

2. If so, has it granted review as to all issues raised in the petition filed by Russ Building Partnership? If not, to what issues (including issues raised in the City's answer to that petition) is review limited?

3. If the Court has not granted review in *Russ Building*, the parties request that the order expressly indicate that the petition for review in that case has been denied, so that it is clear for all purposes that the judgment in *Russ Building* is final. This clarification is important because, among other reasons, it would eliminate any uncertainty as to whether, if desired, review can be sought in the Supreme Court of the United States.

Clarification by the Court of the April 30 order would be helpful to all parties.

Respectfully submitted,

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